

Lettich v Holub

2007 NY Slip Op 30369(U)

March 7, 2007

Supreme Court, Suffolk County

Docket Number: 0020506

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA,**
Justice

MICHAEL A. LETTICH,
Plaintiff,

- against -

LISA HOLUB and GREG K. CROSS,
Defendants.

CASE DISPOSED: NO
MOTION R/D: 7/17/06
SUBMISSION DATE: 1/12/07
MOTION SEQUENCE No.: 002 MG;
003 XMD

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated June 29, 2006; Affirmation dated June 29, 2006; Exhibits A through C annexed thereto; Notice of Cross-Motion dated July 26, 2006; Affirmation in Support; Exhibits A through G; Affirmation in Opposition dated November 15, 2006; Exhibits A through P annexed thereto; Reply Affirmation dated December 20, 2006; Exhibits A through C annexed thereto. and upon due deliberation; it is

ORDERED, that the motion by plaintiff, Michael A. Lettich, pursuant to 3212, for an Order directing the entry of summary judgment in favor of plaintiff on the issue of liability, is granted; and it is further

ORDERED, that the motion by defendants, pursuant to CPLR 3212 and 3211(a)(7), for an Order directing the entry of summary judgment in favor of defendants and dismissing the complaint, on the grounds that the plaintiff did not sustain a serious injury, as defined by Insurance Law § 5102(d), is denied.

The action arises out of a motor vehicle accident which occurred on August 1, 2004, at

the intersection of Route 347 and Pond Path in Brookhaven, New York. The plaintiff was deposed on May 22, 2006. The defendant has not yet been deposed.

The plaintiff testified that at the time of the accident, he had been at a complete stop for approximately one to two minutes in the left turn lane, waiting to turn into a shopping center. The plaintiff further testified that he heard skidding, and approximately two seconds later, his vehicle was struck on the passenger side, front door and fender. As a result of the impact, the plaintiff's vehicle was pushed to the left and struck another vehicle. While the defendants' counsel has submitted opposition to the motion, the defendants have not submitted affidavits disputing the plaintiff's recitation of the facts of the accident as set forth in his deposition testimony. The record is devoid of any evidence to contradict the testimony of the plaintiff or to conclude that the plaintiff was negligent in any way. Accordingly, the Court finds that the defendant was completely at fault for the subject accident and the plaintiff is therefore entitled to summary judgment on the issue of liability.

With respect to the issue of damages, the defendant has failed to make out a prima facie case of his entitlement to judgment as a matter of law.

In support of the instant cross-motion, the defendants have submitted the report of Noah S. Finkel, M.D., who conducted an independent medical examination of the plaintiff on June 8, 2006. Dr. Finkel opined that the plaintiff did not appear to have any evidence of radicular syndrome and that the loss of function in the upper right extremity is a result of the surgical procedure performed on his right wrist. He further concluded that the examination did not indicate further need of orthopedic treatment and that there was no evidence of permanent injury or disability related to the subject accident. The defendants have also submitted the independent radiological medical review of Scott S. Coyne, M.D. dated July 20, 2006. Although the report finds the existence of degenerative disc and facet joint changes, the doctor concluded that the changes were longstanding and preexisted the accident. However, in discussing the left paracentral C5-6 disc protrusion, Dr. Coyne stated "[H]owever, clinical correlation is also recommended to determine if there is any additional causal relationship of this protrusion to the accident of August 1, 2004."

In opposition to the motion, the defendant has set forth the following:

On September 26, 2004, the plaintiff underwent a cervical spine MRI at Medical Arts Radiology which revealed disc herniations at C4-5 and C5-6. Subsequently, he presented to Shalina Patcha, M.D. on October 14, 2004. Dr. Patcha performed an upper extremity EMG on plaintiff, which was positive and revealed cervical radiculopathy at C4-5 and C5-6. The plaintiff has submitted the affirmed medical report of Dr. Patcha, dated October 10, 2006 in which it is concluded that the plaintiff's cervical disc herniations, radiculopathy, muscle spasms, and posttraumatic headaches are causally related to the accident of August 1, 2004.

The plaintiff also treated with Michael Shapiro, M.D., who after the last examination of plaintiff on August 17, 2006 opined that plaintiff was suffering from disc herniations at C4-5 and C5-6, cervical sprain and cervical radiculopathy, and that same were causally related to the subject accident. The plaintiff has also submitted the medical report of Ernest C. Chisena, M.D.,

M.S., dated November 2, 2006 which concludes that “[t]he pathology in the cervical spine is permanent. His symptoms and signs have taken on a chronic and permanent character, considering that they have persisted for over two years.”

The fact that the defendant’s experts disagree with such finding raises an issue of fact in and of itself. It is within the province of the jury, and not the court upon motion for summary judgment, to determine the weight to be given to the examination and findings of plaintiff’s doctor. Bitici v. New York City Transit Authority, 666 N.Y.S.2d 188. Assuming arguendo that defendant’s submissions are sufficient, the medical testimony and the affidavits of doctors Patcha, Shapiro and Chisena, corroborate the presence of disc protrusions and herniations, and present both qualitative and quantitative evidence of such objective findings. The medical records and proof submitted by plaintiff create questions of fact and do not warrant summary judgment. See, Kawaski v. Hertz Corporation, et al., 199 A.D.2d 46, 604 N.Y.S.2d 110. Accordingly, the plaintiff has met his burden of demonstrating the existence of a triable issue of fact as to whether he suffered a serious injury within the meaning of Insurance Law section 5102(d) (see, Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345). The plaintiff shall contact the Calendar Clerk of the Calendar Control Part to schedule the matter for a trial on the issue of damages.

The foregoing constitutes the Order of this Court.

Dated: March 7, 2006

DENISE F. MOLIA

HON. DENISE F. MOLIA J.S.C.